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Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include the Supreme Court's recent decision on proof in discrimination cases, "priority consideration", the burden on management to articulate clear and specific reasons for an employment decision, complaints about the denial of OWCP claims, and EEO claims alleging retaliation for "whistle-blowing".

Also included in this issue is the third in a series of articles concerning frequently asked questions and answers pertaining to the rights and responsibilities of employees and employers with regard to requests for reasonable accommodation of a disability.

The *OEDCA Digest* is available on the World Wide Web at: *www.va.gov/orm*.

Charles R. Delobe

I

SUPREME COURT RULING MAKES PROVING DISCRIMINATION CLAIMS EASIER -- SUPERVISORS TAKE NOTE!!

The recent U.S. Supreme Court case, *Reeves v. Sanderson Plumbing Products, Inc.*, decided June 12, 2000, will make it easier in some cases for employees to prevail on their claims of discrimination.

The plaintiff in the *Reeves* case was a 57-year-old supervisor in the hinge department of a toilet seat manufacturing plant. He was fired for alleged timekeeping errors and misrepresentations. He sued, claiming age discrimination in violation of the *Age Discrimination in Employment Act* (ADEA). Two other younger employees also lost their jobs.

The employer countered with testimony of his substandard job performance, alleging that an audit of his records revealed a variety of timekeeping errors that cost the company money in overpayments to absent or tardy employees. They also alleged that he falsified some company records. Plaintiff Reeves introduced evidence showing that he had not falsified records and that there was no proof that there were any timekeeping errors that had cost the company money.

The question for the court then was as follows: Did the plaintiff have to introduce additional *direct* evidence of discrimination to prevail, or could the jury infer discrimination based on the falsity of the reasons given by the company, coupled with the evidence used to establish his *prima facie* case?

The Supreme Court began by referring to some of its prior decisions that set forth the basic analysis and burdens of proof in EEO cases. It noted that an employee or applicant for employment must first establish a *prima facie* case of discrimination. In the *Reeves* case, the plaintiff easily met that burden under the ADEA by simply showing that he was at least 40 years of age; otherwise qualified for his position; was discharged, and the employer hired other employees who were younger. Generally, a *prima facie* case is easily established, although it is by no means sufficient, in itself, to prove that discrimination occurred.

The burden then shifts to the employer to show that the employee was rejected or someone else was preferred for a legitimate, non-discriminatory business reason. Like the employee's *prima facie* case, the employer's burden of articulation is easily established, requiring nothing more than a clear and specific statement of the reason or reasons for the action or decision complained of.

The employee then has the opportunity to show that the employer's reasons are not true, but are instead a mere <u>pretext</u> to hide a discriminatory motive.

Prior to the Supreme Court's decision in the *Reeves* case, some lower courts had found that, even if employees had proven that the employer's reasons were untrue, they could not prevail unless they were able to produce additional evidence that there was intent to discriminate. If they could not do so, the judge could dismiss the case without

sending it to a jury for a decision.

In *Reeves*, the Supreme Court held that no further additional evidence is needed to prove discrimination. A jury (or other fact-finder such as OEDCA or the EEOC) can *infer* discrimination from the falsity of the employer's defense and the evidence used by the employee in establishing his or her *prima facie* case. In other words, there can be a finding of discrimination as the most likely explanation for an action or decision, once there is a finding of pretext, *i.e.*, when the employer's explanation has been discredited.

Although this was a claim involving age discrimination, the Court's rationale will likely be applied to claims alleging discrimination due to race, color, gender, national origin, religion, retaliation, or disability. Moreover, although this case involved a private sector employer, the Court's holding is equally applicable to complaints filed by Federal employees or applicants for Federal employment.

The important lesson here for supervisors and other management officials is that it is now more critical than ever that the rationale they offer to justify adverse employment actions or other management decisions is clear, specific, consistent, well documented, and supported by the proof.

Even where there is no discriminatory motive involved, a finding of pretext can result from a lack of candor and consistency by management officials when explaining the reason or reasons for a decision. Thus, it is imperative that officials be honest at the early stages when explaining their reasons to employees and EEO counselors. Officials should never succumb to the natural temptation to "spare the employee's feelings" by offering an explanation that is not true. Otherwise, they may find themselves, at a later stage, having to change their explanation when called upon to justify the decision. Unfortunately, their lack of candor at the outset, though understandable, could result in a finding of pretext, even if discrimination were not the actual motive.

II

SUPERVISORS TAKE NOTE, AGAIN!! FAILURE OF SELECTING OFFICIAL TO PROVIDE CLEAR, SPECIFIC REASON(S) FOR NOT PROMOTING COMPLAINANT RESULTS IN FINDING OF DISCRIMINATION

The complainant was one of nine individuals who applied and were referred to the selecting official (SO) for promotion to the position of Motor Vehicle Operator. The SO had three vacancies to fill and chose two applicants who were of a different race than the employee and a third who was the same race. The complainant later filed an EEO complaint alleging that his nonselection was due to his race.

After carefully reviewing the record, OEDCA agreed with and accepted an EEOC administrative judge's decision finding that the complainant's nonselection was due to his race. The record indicated that the SO had passed over the highest-ranking applicant, whose race was the same as the complainant, while at the same time picking a much lower-ranking applicant of a different race.

While these facts might not have been sufficient, by themselves, to prove that discrimination occurred, they were sufficient to satisfy the complainant's initial burden of establishing a *prima facie* case.

The burden then shifted to the SO to articulate legitimate, nondiscriminatory reasons for his selection choices. Unfortunately for management, the SO retired shortly after these selections and failed to reduce the rationale for his decisions to writing. When the EEO investigation was conducted, the SO was unavailable to provide an affidavit and the only agency witness was the SO's supervisor. Unfortunately, he was unable to provide a specific rationale for the selections made by his subordinate, stating only that he was sure that race was not a factor.

The EEOC judge and OEDCA concluded that this explanation was insufficient to satisfy management's burden of articulating legitimate, nondiscriminatory reasons for its decisions. Management's burden of articulation is not onerous – management does not have to prove that it did not discriminate. Instead, it need only articulate the reason(s) for its actions. However, that articulation must be clear and specific enough to provide a complainant with the opportunity to challenge it, or else the complainant will automatically prevail.

Merely stating that the "best applicant" was chosen is not a sufficient articulation -- the reason(s) for that conclusion must be clearly and specifically explained. Likewise, merely claiming that discrimination did not occur is not a sufficient articulation. In this case, because management failed to satisfy its burden of articulation, the complainant was entitled to a finding in his favor, without having to offer any additional evidence of discrimination beyond that required for his *prima facie* case.

This case illustrates two important lessons for supervisors and management officials. First, be sure to offer clear and specific reasons for personnel decisions and other actions, otherwise a finding of discrimination is likely. While there is no legal burden on management to prove that it made the right decision -- it need only articulate a reason -- it certainly behooves management to ensure that such evidence is available and offered if the Department is later called upon to respond to a complaint.

Second, because of turnover due to retirements, resignations, *etc*., and/or the length of time it sometimes takes an agency or the EEOC to investigate a complaint or hold a hearing, it is absolutely imperative that management officials ensure that there is a documented record available that clearly explains the rationale for employment decisions or actions.

III

NO DISCRIMINATION FOUND WHERE COMPLAINANT'S NONSELECTION WAS DUE TO "PRIORITY CONSIDERATION" GIVEN TO ANOTHER APPLICANT BECAUSE OF AN EEO SETTLEMENT AGREEMENT

The complainant and several other employees applied for the position of Su-

pervisory Medical Clerk. However, none of the applicants, save one, was referred to the selecting official for consideration, even though they were all qualified. The one applicant whose name was forwarded for consideration, and who was later selected, was referred under the facility's Priority Placement Program. Under the Priority Placement Program, the applicant was entitled to "priority consideration" for the position pursuant to the terms of a written agreement settling an EEO complaint previously filed by the applicant.

Priority consideration essentially means that the name of a qualified applicant entitled to priority consideration may be referred to and considered by a selecting official before the names of other applicants are forwarded. The selecting official then has the option of choosing that applicant, or requesting that additional applicants be referred.

The complainant subsequently filed a discrimination complaint alleging that her failure to be referred for consideration was due to her race. She claimed that she was better qualified than the selectee and had more time-in-grade. Management countered by stating that the selectee was entitled to priority consideration, was fully qualified for the position and, hence, was properly selected under priority consideration guidelines without having to compete against the other applicants.

OEDCA accepted an EEOC administrative judge's decision finding no discrimination. The complainant presented no evidence that she was treated differently than other similarly situated applicants (*i.e.*, none of the other applicants without priority consideration status were referred). Moreover, she presented no evidence to refute management's assertion that the selectee was entitled to priority consideration; nor did she offer any other evidence that her race was a factor in her nonreferral and nonselection.

IV

EMPLOYEE'S ALLEGATION THAT MANAGEMENT CONTROVERTED HIS *OWCP* CLAIM FOR DISCRIMINATORY REASONS DISMISSED FOR FAILURE TO STATE A CLAIM

An employee filed a race discrimination and reprisal complaint when his supervisor controverted his workers' compensation (*OWCP*) claim. The employee alleged that the supervisor's statements submitted to the Department of Labor (DOL) refuting his claim were false and resulted in the DOL denying the claim and thereby forcing him to use sick leave. According to the record, the supervisor told the DOL that the complainant had falsified his on-the-job injury report because of dissatisfaction with his work assignments.

After carefully reviewing the record, OEDCA accepted an EEOC administrative judge's decision dismissing the complaint for failure to state a claim. Even assuming for the sake of argument that the supervisor's submission to the DOL was false and caused the denial of the employee's *OWCP* claim, the complainant's allegation does not state a claim against the VA. The reason, of course, is that only the DOL has authority to make the final decision on *OWCP*

claims. The VA is without power or authority to offer any relief in such a claim.

The complainant's allegation in this claim constituted, in essence, evidence bearing on the merits of his *OWCP* claim – *i.e.*, whether DOL should have approved his claim for benefits. Such evidence should have been presented to the DOL for consideration. Numerous EEOC decisions have held that a complainant cannot use the EEO complaint process to attack a DOL decision denying an *OWCP* claim.

V

COMPLAINANT'S ALLEGATION OF RETALIATION FOR "WHISTLE-BLOWING" ACTIVITIES UNDERCUTS HER CLAIM OF NATIONAL ORIGIN DICRIMINATION

The complainant accused her supervisor of harassing her because of her national origin (Hispanic) by giving her a written counseling, charging her with AWOL for tardiness, criticizing her work, recommending disapproval of her leave requests, and taking other unfavorable actions against her. Her supervisor is of Mexican origin; hence he is also Hispanic. Moreover, all of the other employees under his supervision are Hispanic.

After reviewing the complaint record in its entirety, OEDCA agreed with and accepted an EEOC administrative judge's decision finding that the VA did not discriminate against the complainant as alleged. The EEOC judge correctly noted that the supervisor provided legitimate, nondiscriminatory reasons for the actions or incidents complained of and that the complainant offered no direct or indirect evidence that those reasons were a pretext (*i.e.*, not the true reasons).

Rather than offer evidence of national origin discrimination, the complainant instead suggested that the "root" cause of the treatment she received was, in her opinion, due to retaliation because of her whistle-blowing activities in connection with an alleged fraudulent budget report. She claimed that she reported this matter to the IG and also raised it in a union grievance proceeding and that, thereafter, her supervisor, who was aware of both her IG complaint and her union grievance, began harassing her.

The EEOC judge noted in her decision that the complainant's allegation of retaliation for whistle-blowing and her union grievance was not only irrelevant to her claim of national origin discrimination, it significantly, if not completely, undercut her claim that the actions complained of occurred because she is Hispanic.

Moreover, the judge correctly pointed out to the complainant that the EEO complaint system is not the proper forum to challenge non-EEO claims such as retaliation for whistle-blowing and that the complainant should have used the appropriate administrative process to raise such a claim.

This case illustrates the not uncommon problem that EEO complainants encounter when they utilize the EEO complaint process to complain about a non-EEO matter. Not only are they unlikely

to prevail on the EEO complaint, they also risk forfeiting their right to challenge the non-EEO matter in the appropriate forum.

Although the complainant was entitled to no relief because she failed to prove national origin discrimination, OEDCA did provide her with information concerning various procedures available for pursuing a whistle-blowing retaliation claim.

VI

FREQUENTLY ASKED QUESTIONS AND ANSWERS CONCERNING AN EMPLOYER'S DUTY TO ACCOMMODATE AN EMPLOYEE'S DISABILITY

(Complaints concerning an employer's failure to accommodate an employee's disability account for a significant number of discrimination complaints filed against private and Federal sector employers. Unfortunately, this is one of the most difficult and least understood areas of civil rights law. This is the third in a series of articles addressing some frequently asked questions and answers concerning the reasonable accommodation requirement. The Q&As below cover accommodation issues relating to job applicants and the benefits and privileges of employment.

REASONABLE ACCOMMODATION AND JOB APPLICANTS

Q. 1. **May** an employer ask whether a reasonable accommodation is needed when **an applicant has not asked for one**?

A. 1. An employer may tell applicants what the hiring process involves (*e.g.*, an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will **need a reasonable accommodation to perform specific job functions**. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.

After a conditional offer of employment is extended, an employer may inquire whether applicants will **need reasonable accommodations related to anything connected with the job** (*i.e.*, job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question. Alternatively, an employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.

Q. 2. Does an employer have to provide a reasonable accommodation to an applicant with a disability **even if it believes that it will be unable to provide this individual with a reasonable accommodation on the job?**

A. 2. Yes. An employer must provide a reasonable accommodation to a **qualified applicant with a disability** that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship). Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for accommodations for the application process separately from those that **may** be needed to perform the job.

Example A: An employer is impressed with an applicant's resume and contacts the individual to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview. The employer cancels the interview and refuses to consider further this applicant because it believes it would have to hire a full-time interpreter. The employer has violated the ADA. The employer should have proceeded with the interview, using a sign language interpreter (absent undue hardship), and at the interview inquired to what extent the individual would need a sign language interpreter to perform any essential functions requiring communication with other people.

Example B: An individual who has paraplegia applies for a secretarial position. Because the office has two steps at the entrance, the employer arranges for the applicant to take a typing test, a requirement of the application process, at a different location. The applicant fails the test. The employer does not have to provide any further reasonable accommodations for this individual because she is no longer qualified to continue with the application process.

REASONABLE ACCOMMODATION RELATED TO THE BENEFITS AND PRIVILEGES OF EMPLOYMENT

The *Americans with Disabilities Act* (ADA) and the *Rehabilitation Act* require employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (*e.g.,* employee assistance programs (EAP's), credit

unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (*e.g.,* parties to celebrate retirements and birthdays, and company outings). If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

Q. 3. Does an employer have to provide reasonable accommodation **to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees**?

A.3. Yes. Employers provide information to employees through different means, including computers, bulletin boards, mailboxes, posters, and public address systems. Employers must ensure that employees with disabilities have access to information that is provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs.

Example A: An employee who is blind has adaptive equipment for his computer that integrates him into the network with other employees, thus allowing communication via electronic mail and access to the computer bulletin board. When the employer installs upgraded computer equipment, it must provide new adaptive equipment in order for the employee to be integrated into the new networks, absent undue hardship. Alternative methods of communication (*e.g.,* sending written or telephone messages to the employee instead of electronic mail) are likely to be ineffective substitutes since electronic mail is used by every employee and there is no effective way to ensure that each one will always use alternative measures to ensure that the blind employee receives the same information that is being transmitted via computer.

Example B: An employer authorizes the Human Resources Director to use a public address system to remind employees about special meetings and to make certain announcements. In order to make this information accessible to a deaf employee, the Human Resources Director arranges to send in advance an electronic mail message to the deaf employee conveying the information that will be broadcast. The Human Resources Director is the only person who uses the public address system; therefore, the employer can ensure that all public address messages are sent, via electronic mail, to the deaf employee. Thus, the employer is providing this employee with equal access to office communications.

Q. 4. Must an employer provide reasonable accommodation so that **an employee may attend training programs**?

A. 4. Yes. Employers must provide reasonable accommodation (*e.g.,* sign language interpreters; written materials produced in alternative formats, such as braille, large print, or on audio-cassette) that will provide employees with disabilities with an equal opportunity to participate in employer-sponsored

training, absent undue hardship. This obligation extends to in-house training, as well as to training provided by an outside entity. Similarly, the employer has an obligation to provide reasonable accommodation whether the training occurs on the employer's premises or elsewhere.

Example A: XYZ Corp. has signed a contract with Super Trainers, Inc., to provide mediation training at its facility to all of XYZ's Human Resources staff. One staff member is blind and requests that materials be provided in braille. Super Trainers refuses to provide the materials in braille. XYZ maintains that it is the responsibility of Super Trainers and sees no reason why it should have to arrange and pay for the braille copy.

Both XYZ (as an employer covered under Title I of the ADA) and Super Trainers (as a public accommodation covered under Title III of the ADA have obligations to provide materials in alternative formats. This fact, however, does not excuse either one from their respective obligations. If Super Trainers refuses to provide the braille version, despite its Title III obligations, XYZ still retains its obligation to provide it as a reasonable accommodation, absent undue hardship.

Employers arranging with an outside entity to provide training may wish to avoid such problems by specifying in the contract who has the responsibility to provide appropriate reasonable accommodations. Similarly, employers should ensure that any offsite training will be held in an accessible facility if they have an employee who, because of a disability, requires such an accommodation.

Example B: XYZ Corp. arranges for one of its employees to provide CPR training. This three-hour program is optional. A deaf employee wishes to take the training and requests a sign language interpreter. XYZ must provide the interpreter because the CPR training is a benefit that XYZ offers all employees, even though it is optional.

VII

EEOC ORDERS NAVY TO SUSPEND ITS PILOT EEO DISPUTE RESOLUTION PROGRAM

The EEOC recently ordered the Department of the Navy to suspend its alternative dispute resolution (ADR) program. The pilot program was designed as an alternative means of processing EEO complaints.

Two Navy employees elected to utilize the pilot program during the pre-complaint counseling stage. As a condition of the program, they had to waive their right to "opt out" of the program -- *i.e.*, waive their right to abandon the ADR program and return to the standard EEO complaint process, where they would be entitled to an investigation into their claims and the right to request a hearing and decision from an EEOC administrative judge. When efforts to resolve their complaints in the ADR process failed, the Navy simply issued a final agency decision on their complaints based solely on information obtained during the ADR process.

The EEOC ordered suspension of the

Navy's ADR program because it violated one of the Commission's core principles for a successful alternative dispute resolution process – the right of an EEO complainant to have his or her complaint processed in the EEO complaint system if ADR efforts fail. Thus, instead of proceeding to issue a final agency decision on the informal complaints without an investigation, the Navy should have conducted a final interview and given the complainants a notice of right to file a formal complaint. The Commission noted that the Navy's ADR program was an obvious attempt to avoid the most significant regulatory change in the Commission's recently revised complaint processing regulations – *i.e*., the right to a hearing and binding decision from an EEOC administrative judge.

In addition, by not conducting a formal agency investigation, as is required under the standard EEO complaint process, the Navy would not be developing an adequate factual record for decision and appeal purposes. Finally, the Commission criticized the fact that the EEO counselor for one of the complainants was also the dispute resolution specialist in that case, thus raising serious questions as to the neutrality of the Navy's ADR procedures.

VIII

DISCIPLINE OF MANAGERS AND SUPERVISORS FOR BEHAVIOR THAT DOES NOT RISE TO THE LEVEL OF SEXUAL HARASSMENT ON THE INCREASE

(The following article is reproduced with permission of "Fedmanager". For other articles of interest to Federal managers, supervisors, and employees, visit the "FEDmanager" website located at www.fedmanager.com.)

It's time again to offer a reminder to managers and supervisors that in today's work place, they should not touch fellow employees or subordinates, or comment on personal appearance. We say this knowing that there is no law that says you cannot hug your subordinates or colleagues in the work place, or tell them you like their haircut, outfit, or tan. But in today's work place, given the developments in the law of sexual harassment, there is a heightened awareness about these matters. This means that except on rare occasions, such touching and comments are no longer acceptable in today's work place, no matter how well intentioned or innocent they may be. The exception may be hugging a subordinate or co-worker during his or her retirement party. Giving subordinates a hug or a neck massage because they "look sad" or have had a "bad day" simply is not acceptable in today's work place, and can only be fertile ground for a complaint against you.

Because of the recent decisions issued by the U.S. Supreme Court in the area of sexual harassment law, the surest way for any employer, including a federal agency, to avoid liability is to take quick and effective remedial action to end improper conduct of its supervisors and managers. This may mean disciplining managers and supervisors who are engaging in arguably "harassing" behavior, even if the behavior does not rise to the level of a Title VII sexual harassment claim. More and more em-

ployers are disciplining managers and supervisors for touching employees, discussing inappropriate topics (such as *Viagra*), and making comments about personal appearance in the work place. Employers do not need to prove that these managers and supervisors actually engaged in sexual harassment to discipline them; they merely have to prove that the actions of the manager or supervisor were inappropriate for the work place.

That standard has changed drastically since Anita Hill testified at Clarence Thomas' confirmation hearing. While managers and supervisors may not agree with the new standard being applied to the work place, the fact remains that they will be held to it. So, our advice is this: do not touch your subordinates or co-workers; do not comment on their appearance; and do not discuss topics related to sex. Managers and supervisors set the tone for the entire office. It is their responsibility to ensure that the office environment is professional.

IX

RATE AT WHICH EEOC ADMINISTRATIVE JUDGES ARE FINDING DISCRIMINATION DECLINES

With the adoption of EEOC's recent revisions to its Federal sector complaint processing regulation that give EEOC administrative judges binding decision authority, most Federal agencies were expecting a significant increase in the rate at which the EEOC judges would be finding discrimination.

While it is still too early to discern a trend – EEOC judges have only had this authority since November 9, 1999 -- VA's experience thus far has been to the contrary. The rate of findings of discrimination by EEOC's judges in VA cases has actually declined substantially. In FY 1995, the finding rate by EEOC judges in VA cases was approximately 15%. In FY 1999, it had declined to approximately 10%. Since the beginning of FY 2000, their finding rate in VA cases has further declined to approximately 3.5%.

In fact, data provided by EEOC to the General Accounting Office (GAO) indicate that the government-wide finding rate by EEOC administrative judges has been declining steadily. In FY 1991, when compensatory damage awards first became available to Federal sector employees who prevailed on their complaints, the finding rate was approximately 15%. For FY 1998 (the most recent data available from EEOC) the rate declined to approximately 7%.